LIBRARY

Office-Supreme Court, U.S.
FILED
FEB 21 1963
JOHN F. DAVIS, CLERK

No. 708

In the Supreme Court of the United States

OCTOBER TERM, 1962

LESTER C. NEWTON TRUCKING COMPANY, ET AL.,
APPELLANTS
v.
UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND ASSOCIATION OF AMERICAN RAILROADS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

MOTION TO AFFIRM

[redacted]

INDEX

	Page
Statement	
The statutory background	2
The facts of this case	5
Argument	6
Conclusion	11

CITATIONS

Cases:	
Consolidated Truck Service, Inc. v. *United States*, 144 F. Supp. 814	2
East Texas Motor Freight Lines, Inc. v. *Frozen Food Express*, 351 U.S. 49	2, 7
Frozen Food Express v. *United States*, 148 F. Supp. 399, affirmed *sub nom. Akron, C. & Y. R. Co.* v. *Frozen Food Express*, 355 U.S. 6	2
Home Transfer & Storage Co. v. *United States*, 141 F. Supp. 599, affirmed, *sub nom. Interstate Commerce Commisison* v. *Home Transfer & Storage Co.*, 352 U.S. 884	3, 4, 8
Hughes Extension—Frozen Foods, 71 M.C.C. 457	4
Midwest Coast Transport, Inc., Extension—Montana, 74 M.C.C. 1	4
Milk Transport, Inc. v. *Interstate Commerce Commission*, 190 F. Supp. 350, affirmed, 368 U.S. 5	9, 10
Premier Peat Moss Corp. v. *United States*, 147 F. Supp. 169, affirmed, 355 U.S. 13	2

676713—63

Statutes and regulation:

	Page
Administrative Procedure Act, Sec. 5(d); 5 U.S.C. 1004(d)	5
Motor Carrier Act of 1935, 49 Stat. 543, 49 U.S.C. 301 *et seq.*:	
Sec. 203(b)(6)	2, 3
Transportation Act of 1958, 72 Stat. 568, 573, 49 U.S.C. 303:	
Sec. 7	3, 6
Sec. 7(a)	3, 9, 10
Sec. 7(c)	4, 10

Miscellaneous:

Administrative Ruling No. 107, March 19, 1958, Bureau of Motor Carriers, Interstate Commerce Commission	4, 9
104 Cong. Rec. 12532, 15528, 15646	10
Hearings on H.R. 5823 Before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess.	3, 10
Hearings on the Problems of the Railroads Before the Subcommittee on Surface Transportation of the Senate Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess.	3, 9
H. Rep. No. 1922, 85th Cong., 2d Sess.	4, 10, 11
H. Rep. No. 2274, 85th Cong., 2d Sess.	4, 10, 11
Interstate Commerce Commission, Seventy-First Annual Report (1957)	3
S. Rep. No. 1647, 85th Cong., 2d Sess.	4, 10, 11

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 768

LESTER C. NEWTON TRUCKING COMPANY, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND ASSOCIATION OF AMERICAN RAILROADS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court dismissing appellants' complaint seeking to set aside orders of the Interstate Commerce Commission. The Commission orders determined that appellants' carriage of certain frozen cooked vegetables was not exempt from Section 203(b)(6) of the Interstate Commerce Act, prior to its

amendment by the Transportation Act of 1958, as the carriage of "agricultural (including horticultural) commodities (not including the manufactured products thereof)."

The statutory background.—The Motor Carrier Act of 1935, 49 Stat. 543, 49 U.S.C. 301, *et seq.*, subjected many aspects of interstate motor carriage to regulation by the Interstate Commerce Commission. Section 203(b)(6), 49 U.S.C. 303(b)(6), however, provided an exemption for "motor vehicles used in carrying property consisting of * * * agricultural commodities (not including manufactured products thereof) * * *." The great expansion of intercity trucking and the rapid development of new food marketing techniques following World War II gave rise to conflicts as to what articles came within the scope of the exemption, and a number of items which had been held nonexempt by the Commission were found upon judicial review to be exempt.[1] In *East Texas Motor Freight Lines, Inc.* v. *Frozen Food Express*, 354 U.S. 49, 54, this Court held that frozen poultry was an exempt agricultural commodity and set down the following standard: "[W]here the commodity retains a continuing substantial identity through the processing stage we cannot say that it has been 'manufactured' within the meaning of § 203

[1] *East Texas Motor Freight Lines, Inc.* v. *Frozen Food Express*, 351 U.S. 49; *Frozen Food Express* v. *United States*, 148 F. Supp. 399, 401 (S.D. Tex.), affirmed *sub nom. Akron, C. & Y. R. Co.* v. *Frozen Food Express*, 355 U.S. 6; *Premier Peat Moss Corp.* v. *United States*, 147 F. Supp. 169 (S.D. N.Y.), affirmed, 355 U.S. 13; *Consolidated Truck Service, Inc.* v. *United States*, 144 F. Supp. 814 (D. N.J.).

(b)(6)." In a subsequent application of this criterion, frozen fresh vegetables which had first been blanched or parboiled to kill enzymatic action prior to the freezing process were held to be unmanufactured and hence exempt in *Home Transfer & Storage Co. v. United States*, 141 F. Supp. 599 (W.D. Wash.), affirmed, *per curiam, sub nom. Interstate Commerce Commission v. Home Transfer & Storage Co.*, 352 U.S. 884.

In response to widespread sentiment that the agricultural commodities exemption be clarified,[2] Congress amended Section 203(b)(6) by Section 7 of the Transportation Act of 1958, 72 Stat. 573 (see J.S. 45–47). Section 7(a) added two provisos to Section 203(b)(6):

> *Provided*, That the words "property consisting of * * * agricultural (including horticultural) commodities (not including manufactured products thereof)" as used herein shall include property shown as "Exempt" in the "Commodity List" incorporated in ruling numbered 107, March 19, 1958, Bureau of Motor Carriers, Interstate Commerce Commission, but shall not include property shown therein as "Not exempt": *Provided further, however*, That notwithstanding the preceding proviso the words 'property consisting of * * * agricultural (in-

[2] See Hearings on the Problems of the Railroads Before the Subcommittee on Surface Transportation of the Senate Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess. (1958); Hearings on H.R. 3823 Before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess. (1958); Interstate Commerce Commission, Seventy First Annual Report 138–139 (1957).

cluding horticultural) commodities (not including manufactured products thereof)' shall not be deemed to include * * * frozen vegetables [and ten other named commodities].

Administrative Ruling 107, incorporated into the Act by the first proviso, was a list indicating the exempt or nonexempt status of various agricultural commodities as determined by the courts or the Commission. For example, in accord with the decision in the *Home Transfer & Storage* case, *supra*, frozen fresh vegetables were listed as exempt. Frozen candied sweet potatoes and french fried potatoes were shown as nonexempt on the basis, respectively, of *Hughes Extension—Frozen Foods*, 71 M.C.C. 457, and *Midwest Coast Transport, Inc., Extension—Montana*, 74 M.C.C. 1. The ruling also indicated the opinion of the Bureau of Motor Carriers concerning the status of various additional items. Thus, cooked vegetables were listed as nonexempt. By incorporating Ruling 107 Congress gave statutory recognition to hundreds of designations of the exempt or nonexempt status of commodities.

In addition, Congress returned to regulation "frozen vegetables" and the ten other enumerated items. See H. Rep. No. 2274, 85th Cong., 2d Sess., p. 15; S. Rep. No. 1647, 85th Cong., 2d Sess., p. 4; H. Rep. No. 1922, 85th Cong., 2d Sess., pp. 16–17. With regard to the commodities which the Act returned to regulation, Congress provided for "grandfather" rights. Section 7(c) of the 1958 Act states than "any person * * * in bona fide operation on May 1, 1958 * * * in the transportation of property for compensation by motor vehicle made subject to the

provisions of part II of that Act by paragraph (a) of this section * * *" would be entitled to a permit or certificate without a hearing to consider public convenience and necessity.

The facts of this case.—Appellants petitioned the Commission for a declaratory order under Section 5(d) of the Administrative Procedure Act, 5 U.S.C. 1004(d), to declare that frozen french fried potatoes and certain other frozen cooked vegetables were exempt prior to the 1958 Act and therefore that they were entitled to "grandfather" rights. Division 1 of the Commission determined that they were not exempt. On August 3, 1961, the entire Commission denied the petition for reconsideration. The appellants then sought injunctive relief in the district court against the enforcement of the Commission's order. The court held that the Commission applied a proper criterion in determining the status of the commodities

---

[1] The Commission's conclusion was as follows (J.S. 41): "We conclude, and so find that the term 'agricultural (including horticultural) commodities (not including the manufactured products thereof)' as used in section 203(b)(6) of the Interstate Commerce Act prior to the amendment thereof by the Transportation Act of 1958, did not include frozen french fried potatoes, frozen rissole potatoes, frozen potato puffs, frozen candied sweet potatoes, frozen whipped potatoes, frozen french fried onion rings, frozen precooked pouch-packed vegetables in general, and frozen precooked pouch-packed vegetables with sauce in particular. We further conclude and find that such term did not include any frozen vegetable which has been cooked in water or steam for a period longer than that necessary for the inactivation of the enzymes; any frozen vegetable which has been cooked by immersion in oil or fat; or any vegetable product the ingredients of which include vegetable matter combined with other commodities."

prior to 1958 (J.S. 29) and that the result reached by the Commission was in accord with Section 7 of the 1958 Act (J.S. 23–28).[4]

ARGUMENT

This case presents no substantial question warranting plenary consideration by this Court. It is undisputed that carriage of the frozen cooked foods involved in this case is now regulated under the Motor Carrier Act. If this carriage was first made subject to regulation by the Transportation Act of 1958, appellant carriers would be entitled to "grandfather" rights; if, on the other hand, the carriage was not exempt from regulation prior to the 1958 Act as "agricultural * * * commodities (not including manufactured products thereof)," appellants are not entitled to "grandfather" rights. The Commission found that the carriage was not exempt before the 1958 amendment was passed. We submit that its construction of the agricultural commodity exemption was a valid exercise of administrative expertise, which was properly sustained below.

1. The Commission correctly ruled that the frozen cooked vegetables processed or transported by appellants were not exempt prior to the 1958 amendment.

a. Contrary to appellants' contention (J.S. 15), the Commission applied the "continuing substantial identity" test enunciated by this Court in *East*

[4] While the district court upheld the Commission's ruling with respect to the specified frozen vegetables and the enzyme inactivation test, it ruled that the last two tests in the passage quoted in note 3, *supra*, were not ripe for review in this case (J.S. 29–30).

Texas Motor Freight Lines, Inc. v. *Frozen Food Express*, 351 U.S. 49. The Commission set out in detail the processes by which the various vegetables are made into the frozen products at issue (J.S. 36-39). Most of the technical evidence concerned french fried potatoes, and the Commission concluded (J.S. 39-40):

> French fried potatoes, as named and distributed by the frozen food industry, are a product far removed from the potato as it is taken from the field. They have become partially impregnated with oil and have undergone substantial textural changes including the expansion of up to 80 percent of the natural starch content. They have acquired a separate and distinct name, character, and use. They are frequently referred to merely as "french fries," without the use of the word "potato" at all. Certainly, it cannot be said that this product has retained a continuing substantial identity to the potato as harvested through the elaborate processing heretofore described. Compare *East Texas Motor Freight Lines, Inc.*, v. *Frozen Food Exp.*, 351 U.S. 49, wherein the so-called continuing substantial identity test was announced. We conclude that the transportation of frozen french fried potatoes has never been exempt from economic regulation under the provisions of section 203(b)(6) of the act.

The Commission also applied the same standard to the other products, stating (J.S. 40):

> We cannot accept petitioners' contention that the cooked and otherwise altered vegetables and products heretofore described merely have been "processed" for market and continue to main-

tain their identity as vegetables. They are, in fact, prepared foods and we think that they are embraced within the term "manufactured products" as used in section 203(b)(6) of the act.

b. Appellants object (J.S. 12–15) to the use of the enzyme inactivation test by the Commission. In *Home Transfer & Storage Co.* v. *United States*, 141 F. Supp. 599 (W.D. Wash.), affirmed, *per curiam*, *sub nom. Interstate Commerce Commission* v. *Home Transfer & Storage Co.*, 352 U.S. 884, it was held that frozen vegetables that had only been parboiled or blanched, but not cooked beyond the enzyme inactivation point, were exempt agricultural commodities (J.S. 41). Such parboiling is necessary to make it possible to preserve vegetables by the freezing process (J.S. 35). In this process, the vegetables are kept as close to being fresh vegetables without the risk of spoilage as is technologically possible. In contrast, further cooking before freezing will "effect a substantial change in the texture of the vegetable as it comes from the field" and is intended to do so (J.S. 39). Thus, the enzyme inactivation test helps to ascertain whether, under the test laid down in the *East Texas Motor* case, frozen vegetables retain their substantial identity through the processing stage and are therefore still agricultural commodities or lose their identity and are manufactured.

All the products here involved were cooked beyond the point necessary for the inactivation of enzymes to the stage of making a substantial change in their texture (J.S. 29, 41). Most of them underwent additional processing—for example, by slicing, mashing, extrud-

ing, immersion in oil, frying in batter, adding sauces and garnishes—to produce what the Commission correctly called "prepared foods" (J.S. 40). They are therefore "manufactured products" excluded from the agricultural commodity exemption.

2. Even if the carriage of the frozen cooked vegetables involved in this case had been exempt prior to the 1958 Act, no "grandfather" rights would have been conferred by that Act. Congress could, and did, give limited grandfather rights only for those specific commodities whose previously exempt status was rescinded by the second proviso of Section 7(a). *Milk Transport, Inc., v. Interstate Commerce Commission*, 190 F. Supp. 350, 352–353 (D. Minn.), affirmed, 368 U.S. 5. The first proviso added by Section 7(a) of the 1958 Act conferred a statutory status upon Commission Ruling 107 and thereby determined that various commodities, including those here involved, would continue to be "not exempt,"[5] even though they might otherwise have escaped regulation through future litigation. Congress did not consider such commodities as thereby returned to regulation for the purpose of grandfather rights. Instead, Congress adopted Ruling 107 as a device for specifying exempt and nonexempt agricultural commodities and for designating those nonexempt commodities which were to be covered by grandfather rights. *Milk*

[5] Some of the commodities were specifically nonexempt under Ruling 107. As to the others, the district court found they were "cooked vegetables" which Ruling 107 declared to be nonexempt (J.S. 27, 28). The district court, in making this determination, applied the enzyme inactivation test which is discussed above (pp. 8–9).

Transport, Inc. v. Interstate Commerce Commission, *supra*, 190 F. Supp at 353.

3. Appellants seek to rely (J.S. 13–15) upon the second proviso added by the Transportation Act of 1958, listing "frozen vegetables" among the eleven specific items expressly made subject to regulation. They contend that all frozen vegetables were intended to be covered by the grandfather rights, even if they had not been exempt before 1958.

Appellants' contention is in conflict with the language of Section 7(c). That Section provides for grandfather rights only for commodities "made subject to" regulation by Section 7(a); *supra*, p. 4. *Milk Transport, Inc. v. Interstate Commerce Commission*, *supra*. Since the frozen vegetables involved here were already subject to the Act prior to the enactment of Section 7(a), no grandfather rights were conferred.[6]

This construction of the clear language of the statute is confirmed by the congressional purpose in enacting the 1958 Act. Because of the adverse impact upon regulated carriers, Congress decided to halt any further expansion of the agricultural commodity exemption. Congress was seeking to limit the exemp-

---

[6] See H. Rep. No. 2274, 85th Cong., 2d Sess., p. 15; S. Rep. No. 1647, 85th Cong., 2d Sess., p. 4; H. Rep. No. 1922, 85th Cong., 2d Sess., p. 17; 104 Cong. Rec. 12532, 15528, 15646; Hearings on the Problems of the Railroads Before the Subcommittee on Surface Transportation of the Senate Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess., p. 2216; Hearings on H.R. 5823 Before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess., pp. 159–160, 169, 183, 189.

tion, not expand it. See H. Rep. No. 2274, 85th Cong., 2d Sess., p. 15; S. Rep. No. 1647, 85th Cong., 2d Sess., p. 4; H. Rep. No. 1922, 85th Cong., 2d Sess., pp. 16–17. Consequently, the mere fact that a commodity falls within the generic meaning of one of the eleven items listed in the second proviso is not enough to qualify it for grandfather rights unless it had been nonexempt prior to the 1958 Act and was thereby being returned to regulation. It would have been anomalous to provide a prescriptive or "grandfather" right if there had been no initial right of exemption which was terminated.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment below should be affirmed.

ARCHIBALD COX,
Solicitor General.

LEE LOEVINGER,
Assistant Attorney General.

LIONEL KESTENBAUM,
I. DANIEL STEWART, JR.,
Attorneys.

ROBERT W. GINNANE,
General Counsel,
FRITZ R. KAHN,
Assistant General Counsel,
Interstate Commerce Commission.

FEBRUARY 1963.